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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

23 Cr. 10 (AS)

AVRAHAM EISENBERG,

Defendant.

Conference

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New York, N.Y.
March 29, 2024
1:00 p.m.

Before:

HON. ARUN SUBRAMANIAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

BY: PETER J. DAVIS

THOMAS S. BURNETT

TIAN HUANG

Assistant United States Attorneys

BRIAN E. KLEIN

SANFORD N. TALKIN

NOAM B. GREENSPAN

Attorneys for Defendant

Also Present: Special Agent Brandon Racz

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(Case called)

THE DEPUTY CLERK: Counsel, note your appearances.

MR. DAVIS: Good afternoon, your Honor. Peter Davis, Thomas Burnett and Tian Huang for the government, and I'm joined at counsel table by Special Agent Brandon Racz.

MR. KLEIN: Good afternoon, your Honor. Brian Klein with Avraham Eisenberg and co-counsel Sam Talkin and Noam Greenspan.

THE COURT: Okay. Good afternoon. And, Mr. Klein, we've squared everything away so that Mr. Eisenberg can speak with his parents after the conference?

MR. KLEIN: Yes, we did, your Honor. We appreciate the Court's assistance and government's help too.

THE COURT: And the Court has made some inquiries with the facility, and the hope is that by some time next week at least they'll be in a position to recommence having social visits. Please let me know if there is any further difficulties or some lack of information, or if there's any way that I can help because I think that there was some surprise that there were some issues at the facility that the Court had not been apprised of. And so if those continue, let me know.

MR. TALKIN: Yes, your Honor. Thank you. I just want to let you know, we've been in touch with the government. We do have some concern about his access to his computer and using. Government is trying to help us out. If there's an

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1 issue, we'll file a letter. We're on top of that. Thank you.

2 THE COURT: That's a good way to start the conference.
3 So the one thing, we have sometime. Sometimes these
4 conferences happen the day before trial begins or a couple of
5 days before. We've got a week. To the extent that there are
6 issues that I can help with, get them to me during this time
7 when we have it so that we're not in a position where we have
8 to waste the jury's time dealing with these issues; or there's
9 not something that just comes up or we could have taken care of
10 it and it poses a difficulty during trial. Okay.

11 All right. Let's start with, let me ask the government
12 if there have been any plea offers, and we can start there.

13 MR. DAVIS: So, your Honor, the answer as to this case
14 there's been no normal plea offers made to Mr. Eisenberg.

15 THE COURT: Okay. Any questions that defense counsel
16 has along those lines or anything they wanted to raise?

17 MR. KLEIN: No, your Honor.

18 THE COURT: Okay. So then let's proceed to the
19 government's motion *in limine*. On the first issue raised as to
20 the interrogatories on the verdict form. I take it given
21 Mr. Eisenberg's response that there's no issue -- the issue
22 that was presented in the government's motion is not an issue.
23 At this point it becomes a question for the Court as to which
24 route it will take in terms of fashioning the verdict form, but
25 I'll hear from the government if they think that there is still

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1 a remaining issue to be resolved on a motion *in limine*.

2 MR. BURNETT: Which particular, on the verdict form
3 issue?

4 THE COURT: On the verdict form issue, I understand
5 Mr. Eisenberg is saying, look, we're just trying to make clear
6 that you have to be unanimous as to one of the things that
7 enumerated in the regulation, which I think the government
8 agrees to because that's reflected in the government's jury
9 instructions. They're not trying to make the argument that the
10 means need to bare a unanimous finding.

11 MR. BURNETT: If that's the Court's understanding,
12 then the government is comfortable with that.

13 THE COURT: Is that also defense's understanding.

14 MR. GREENSPAN: Your Honor, we're comfortable with
15 that. Yes, that's our understanding.

16 THE COURT: So then the Court will resolve that issue,
17 and it has both sides' positions on that. So the second issue.
18 Now the other issue that the defendant raises in the response
19 to the motion *in limine* concerns a variance from the
20 indictment. I take it that that's being raised almost as a
21 shot across the bow to the government, and not for something
22 for me to resolve at this juncture?

23 MR. GREENSPAN: I wouldn't use that term, but, yes,
24 your Honor. We're flagging the issue in the similar way to
25 some of the motions *in limine* that the government raised as to

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1 sort of percolating issues that, should they become relevant
2 later on, the discussion is already been started.

3 THE COURT: To be clear, what I'm concerned with
4 primarily at this juncture is making sure that if there are
5 issues that are going to be presented or are going to bubble to
6 the surface during openings or during the examinations of
7 witnesses, those are the issues that we should take up right
8 now. If you are forecasting that you're going to have a good
9 argument for dismissal of the charges before trial, I get you,
10 and you probably are trying to forecast that to prevent the
11 government from doing anything during the case that would put
12 them in that situation. I understand. I'm going to remind you
13 like ten times to try to get in as many of these issues so that
14 I can resolve them before trial as possible. Understand that
15 on the variance issue.

16 So let's talk about the SEC and CFTC complaints. I
17 think the ball is in your court Mr. Talkin or Mr. Klein,
18 whoever wants to address it.

19 MR. KLEIN: Yes, your Honor. They had emailed us on
20 Monday and asked us about that. We were considering it. They
21 filed their motion. We do not plan to offer the CFTC and SEC
22 complaint at this time into evidence. Obviously they could
23 open the door in some way or do something at trial where we
24 would revisit it, but that's not our intention right now, so we
25 don't plan to offer that.

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1 THE COURT: Okay. And in your mind, what would that
2 opening of the door look like?

3 MR. KLEIN: I'm not sure exactly, your Honor. But
4 maybe they asked a question of a witness about the SEC or
5 something, and therefore it becomes relevant to the
6 cross-examination; or they ask something about the CFTC. It's
7 hard for me to imagine it, but I'm just trying to think somehow
8 those three letter names come up in some way by the witness.

9 THE COURT: You've preserved all your rights in this
10 regard, so that prong of the motion *in limine* will be granted
11 on consent; with the understanding that if the government opens
12 the door, then the Court will take up the issue at that time.
13 So that leaves the October 24, 2018 tweet.

14 MR. KLEIN: Yes, your Honor. We received their --
15 this will explain it -- their exhibit list and witness list on
16 Monday. And we are going through that and piecing together --
17 they are excerpts of statements that they allege were made by
18 our client to do our rule of completeness analysis. We're
19 actively working on that. There's lots of proposed exhibits on
20 this, lots of statements they would intend to offer. The way
21 we would see that tweet coming in right now would be in some
22 sort of rule of completeness argument. We're not there yet,
23 your Honor. There's literally dozens and dozens and dozens of
24 statements. So I don't have an argument now for that, but we
25 are working on that actively to figure out if we would intend

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1 to offer that under the rule of completeness.

2 We would let them know that, the government know that.
3 And then if they agree or disagree, if they agree great, we
4 don't have to come to the Court. But if they disagree, we
5 would flag that for the Court. And I understand you want to
6 flag as many issues as possible before trial. To that regard,
7 I'll just go pass that one exhibit. If there are other rule of
8 completeness issues that come up, we're going to meet and
9 confer with the government hopefully early next week or
10 mid-next week and try to resolve any disputes with them. And
11 if we can't, we would bring it to the Court's attention to try
12 to resolve it before the jury comes in.

13 THE COURT: Okay. As to this issue, I will deny
14 without prejudice the motion as to the tweet understanding that
15 the parties are going to discuss this and present it. And if
16 there's any other ground other than the rule of completeness,
17 then, Mr. Klein, then you will raise that with the Court.

18 MR. KLEIN: Yes, your Honor.

19 THE COURT: Motion to quash was denied based on the
20 understandings and limitations expressed in Mr. Eisenberg's
21 letter. So let me open the floor. I'll hear from the
22 government first on any other legal issues that I may have
23 missed that have bubbled to the surface and that the Court
24 should resolve at this juncture. I have a list of some things
25 that I wanted to cover as well.

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1 MR. DAVIS: So, your Honor, nothing outstanding that's
2 currently briefed before the Court, unless I'm missing
3 something. But we're happy to hear from the Court. We have a
4 set of issues too, but they're not as substantive as what we've
5 been discussing.

6 THE COURT: Rebuttal expert. Mr. James' first
7 opinion. Are you planning to --

8 MR. DAVIS: No, your Honor. Just to be clear, what
9 was his in rebuttal notice, the final rebuttal notice that
10 Mr. James provided.

11 THE COURT: Okay. Understood. Let me turn to
12 Mr. Klein. Anything again in the vein of general legal issues
13 that the Court needs to attend to right now?

14 MR. KLEIN: No, your Honor. We have some procedural
15 stuff too. I think we all have the same things to discuss.

16 THE COURT: Okay. Let me turn back to the government.
17 So help me with, what is "willfulness" mean in this context?
18 And just as a backdrop, I've gone through the parties' request
19 to charge. I haven't seen anything -- I have a couple of
20 things I want to talk about, but what I'm really searching for
21 are things that are going to present issues and objections
22 during openings in the examination of witnesses. There's not a
23 lot that I've seen, but I want to put that in your mind so that
24 if you've seen things and you understand that there are
25 disputes that are going to be presented because people are

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1 going to be arguing the case in ways that are inconsistent with
2 the parties' request to charge, let me know so I that can
3 resolve those issues in advance of the beginning of trial.
4 With that backdrop, let me ask the government, what does
5 "willfulness" specifically mean in this context?

6 MR. BURNETT: In our view "willfulness" only applies
7 in the commodities fraud count, so Count One. In the context
8 of that count it means that the defendant understood that what
9 he was doing was wrong.

10 THE COURT: Does that require knowledge of
11 unlawfulness?

12 MR. BURNETT: No.

13 THE COURT: So that is a dispute between the parties?

14 MR. BURNETT: That's correct.

15 THE COURT: There is case law that indicates that at
16 least -- well, what does "wrong" mean? Because there are cases
17 that use "wrongful" and "unlawful" in the same breath. How do
18 I understand those cases?

19 MR. BURNETT: I think "wrongful" means he understood
20 that what he was doing was -- it could include "unlawful."
21 That's a subset of wrongfulness, but it also includes generally
22 wrongful in the moral sense as well. It's broader than the
23 term unlawful. And this is important. I think the case law in
24 the Second Circuit has really only interpreted "wrongful" to
25 mean knowledge that the defendant -- what the defendant was

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1 doing was unlawful in a couple narrow circumstances. One is in
2 the context of like insider trading like in a tipper chain.
3 And the other is in the context of like tax cases basically.
4 And otherwise the Second Circuit has held that "wrongful" is
5 the appropriate instruction. I'd also add that I actually
6 think there's an extra layer of incorrectness to the
7 instruction that the defense is proposing beyond the unlawful
8 point.

9 And that's that, I think it is clear under even courts
10 that have given an unlawful instruction that a mistake of law
11 is not a defense. Instead, the defendant just needs to
12 generally have a sense or have a knowledge that what they were
13 doing was unlawful. And I think we can and would like to
14 submit a letter on this if it's something the Court wants to
15 resolve ahead of trial. But it's important because this is, I
16 think, really crystalized in the Commodities Exchange Act in
17 the provision. I think it's Section 9.1 that lays out all the
18 potential violations of the Commodities Exchange Act. And that
19 provision there says that a willful violation of a regulation
20 is criminal. And then a further subsection down says that it
21 is an affirmative defense to jail time, but not to the felony
22 if the defendant can prove that they didn't know about the
23 existence of the law or regulations with which they've been
24 charged.

25 THE COURT: Which is my next question which is, is

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1 that at play here?

2 MR. BURNETT: I don't know if that's something that
3 the defense intends to invoke, but I think for the purposes of
4 this willful instruction, I think that's very powerful. The
5 mistake of law or not having knowledge of the CEA or the
6 application of the CEA to this particular case or this fact
7 pattern is not a defense to the felony charge, otherwise that
8 jail provision would have no effect or meaning.

9 THE COURT: Well, there's three levels. There's the
10 tax context, like kind of knowledge of the actual provision
11 which is reflected perhaps in this defense that's in 7, U.S.C.
12 13 (a)(5). There's that. There's the general unlawfulness of
13 the conduct. And then there's wrongfulness that is even
14 broader than generally something being unlawful. And you're
15 saying that last one?

16 MR. BURNETT: Yes.

17 THE COURT: Okay. Mr. Klein, do you have a position
18 or whoever, Mr. Greenspan.

19 MR. GREENSPAN: I think the government suggestion that
20 we write on this is one that we would second. You've seen I
21 think our proposed instructions. We believe "willfulness" is
22 an element or a part of the intent element in both wire fraud
23 and commodities fraud. It's in the same charge. We can cite
24 to a number of district courts, courts in this district that
25 have given that charge. I think it's typically given, maybe

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1 always given. And as to the issue of "wrongfulness" in this
2 moral sense, I don't think that's the law. I also think it's
3 extremely difficult to qualify or define what a moral sense is.
4 I don't think that's a workable standard. And in terms of -- I
5 think some of what the government was getting at was mistake of
6 law. Mistake of law is not the instruction that we gave. We
7 gave an instruction about the general lawfulness and
8 understanding of that. And those are two very different
9 things, and so I think the nuance of this makes it worth having
10 a written submission about it.

11 THE COURT: I agree. So let's circle that. And if
12 there's other things, then we can put it all in the same track.
13 I agree that we'll need some letters on that. Mr. Greenspan,
14 at this present time is this defense that's in the statute
15 being invoked, because it would require a jury finding. And so
16 I would think that the normal conduct would be to put it in
17 front of the jury in connection with everything else?

18 MR. GREENSPAN: If your Honor would indulge us, I
19 think we'd like to give you a formal answer to that in our
20 letter.

21 THE COURT: Okay. We'll roll it up there. Okay.
22 Back to the government. On page six of the government's
23 request to charge, this is what it says, Because market
24 participants ordinarily assume that prices, such as the prices
25 of cryptocurrency or perpetuals, are determined by the natural

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1 interplay of supply and demand. An act is manipulative if it
2 is designed to deceive or defraud others by sending a false
3 pricing signal to the market.

4 So are market participants ordinary assumptions
5 relevant in this case? And the reason I ask this is because we
6 had a lengthy discussion about a blame the victim defense and
7 how that wasn't part of this case, and I get that. But would
8 the expectations of the participants on an exchange like Mango
9 Markets be relevant if that informs what their assumptions
10 would be about normal trading activity on that exchange.

11 MR. BURNETT: I think the language you're citing is
12 one that, at least in our view, it's been in a number of
13 instructions, in *Phillips*. It was also in the instruction that
14 Judge Cote gave in the *Set Capital* case is that -- what that is
15 instructing the jury is that -- effectively giving the jury an
16 explanation for the reason why legally manipulation is fraud.
17 It's essentially giving the jury, like, the statute is enacted
18 on this assumption that people in markets assume that prices
19 are set by the natural interplay of supply and demand. And
20 that's why controlling a price can be -- it can be a false act
21 when it's not fully disclosed to other members of the market.
22 So we think that's something that should be in the instructions
23 itself. I don't think the expectation of the parties one way
24 or another, or expectation of market participants can defeat
25 that legal premise, that is the premise of the statute.

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1 THE COURT: I wouldn't call it a legal premise. It's
2 just the premise of the proposed instruction with the
3 defense -- does the defense agree as to that predicate for the
4 instruction?

5 MR. GREENSPAN: No, the defense does not agree.

6 THE COURT: All they're saying is, that is an
7 incorrect assumption in this context. Because it is incorrect
8 in this context, they're just saying, you can argue that it is
9 and they want to argue that it's not. So it seem to be in play
10 for the purposes of the case. That doesn't affect anything
11 that we've discussed in terms of the motions *in limine*. I
12 agree with the government that the blame the victim defense,
13 the vulnerabilities of the system, that's not relevant to
14 anything. However, if they wanted to show that participants in
15 this market fully understood that any trade that happened could
16 be natural supply and demand, or it could be trading strategy.
17 It could be people trying to make a quick buck. It could be a
18 number of different things. That would seem to be an argument
19 that they could make that would be relevant. This is the type
20 of issue because I foresee this coming up that I want to make
21 sure we're on the same page about.

22 MR. BURNETT: On that point then, in terms of what the
23 government is able to do with witnesses. This is something
24 that also came up I think sort of with respect to materiality
25 in the *Phillips* case is, the proper way for the government to

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1 refute or answer that sort of factual contest by the defense is
2 to put a specific hypothetical to the witnesses or the market
3 participants that, this is effectively, Do you expect when you
4 trade in these markets, do you expect that the price is going
5 to reflect manipulative conduct by another market participant,
6 which is effectively the materiality. I just want to make sure
7 that -- cause I know there's some sensitivity around the
8 wording.

9 THE COURT: I think as phrased there would be problems
10 with that question coming from the government. You're saying
11 like a properly phrased question that just goes to this issue?

12 MR. BURNETT: Yes, a properly phrased question that
13 goes to the issue. Maybe we'll have to brief what a properly
14 phrased question would look like. Cause in the embedding
15 materiality hypotheticals, that is one exception where you are
16 allowed to put the actual issue in front of the witness,
17 because otherwise there's no real way for us to get at the
18 point.

19 THE COURT: So maybe the parties should talk about
20 what this is going to look like, and this can be put into the
21 letter. Because I think this is going to be something that is
22 going to come up, so I would like to have some clarity.
23 Mr. Greenspan or Mr. Klein if anyone wants to be heard on the
24 defense side.

25 MR. GREENSPAN: Your Honor, I think you correctly

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1 understood our position, which is that we would object to a
2 question like that. We think that it actually gets at a number
3 of things that we talked about as being inappropriate for
4 expert testimony. We think it would be improper for the same
5 reasons for lay witnesses to testify that way.

6 THE COURT: Mr. Burnett, I understood when you
7 describing why this is part of the instruction. That you're
8 just saying this is the background that courts give because
9 under normal circumstances it's kind of accepted, so it's not
10 something that you're trying to prove.

11 MR. BURNETT: So if the defense tries to disprove it,
12 we will need to prove it to the jury. So I think that was what
13 was --

14 THE COURT: What I think they're trying to disprove I
15 suppose is the ultimate question of price artificiality, like
16 what does this mean in this context. They're trying to say in
17 this specific context, it's not an artificial price because of
18 the expectations of people in the market. I mean that's what
19 they're ultimately trying to do.

20 MR. BURNETT: What I'm saying is that to rebut that
21 argument, we need to ask them, is your expectation that the
22 price will not be set by someone intentionally trying to drive
23 the price up.

24 THE COURT: I think this is something I'll take
25 submissions on, and we'll set a schedule for that. As you

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1 forecasted, Mr. Burnett, I had the same question on
2 materiality, so I think you're correct that the same sort of
3 issue is raised there.

4 One question on materiality. The instruction
5 references a reasonable person. Is that a reasonable person
6 similarly situated to the alleged recipient of the
7 misrepresentation, meaning that when we're talking about who
8 the reasonable person here is, is it just a reasonable person
9 like out on the street; or is it a reasonable person who would
10 be trading on Mango Markets or in the position of the Mango
11 Markets DAO, something of that kind?

12 MR. BURNETT: I think it's a reasonable person like in
13 the context of the universe we're dealing with here, as opposed
14 to someone off the street.

15 THE COURT: Okay. So again, same sort of question
16 raised. If that's true, then wouldn't it matter if, for
17 instance, there was evidence that people knew and did not care
18 about this type of conduct in this context. Because if the
19 materiality question focuses on what would be important to a
20 reasonable person in that situation, then it seems like
21 evidence -- it seems like maybe there's a wider birth for the
22 evidence than possibly when we were discussing the motions *in*
23 *limine* the Court appreciated. Because there is some way in
24 which the person receiving the communication, what they viewed
25 as either important or not important would be relevant under

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1 the government's proposed instructions.

2 MR. BURNETT: I think what people think is important
3 or is not important is relevant under our proposed
4 instructions. I think that's different from some of the issues
5 that we were discussing in the motion *in limine* Daubert section
6 because that goes to what someone should have thought about,
7 which is a pure, like, negligence theory.

8 THE COURT: Agreed. Understood. Again, I'm really
9 telling the parties this because these issues have not been
10 raised. And I know, I know we tried to provide guidepost and
11 provide these issues on the motions *in limine*. I'm telling you
12 the way I'm seeing this now so as you think about putting your
13 case together and you know these issues are going to come up,
14 you come tell me so that we can hash it out not in the presence
15 of the jury, and we'll certainly make time for that.

16 In connection with the swap. This is something that
17 we've talked about, Mr. Burnett, before. It doesn't have to be
18 fraud or manipulation with respect to a counter-party to the
19 transaction. That was just the situation in *Phillips*, and
20 that's why it was presented in that manner?

21 MR. BURNETT: That's right.

22 THE COURT: Both sides seem to recognize that
23 "coincides" is a word that's used in the case law, but what
24 does that mean? Because obviously "coincides" could be, it
25 just happens to coincide with it, but I take it that the case

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1 law means something more than that.

2 MR. BURNETT: So our view is that in the context of
3 this case, the "coincide" is that misrepresentation with
4 connection to the value of the swap is used to obtain the
5 proceeds from Mango Markets. It used as collateral for the
6 loan that Mr. Eisenberg took out. So that's our view. In
7 terms of like -- I'm giving a sort of factual description here
8 because the case law where the "coincides" comes from is sort
9 of resisted a more concrete definition of "coincide," so I'm
10 reluctant to kind of say something that the courts haven't
11 here. But I think it's a jury question on how that term
12 applies to the facts here and whether we meet that or not.

13 THE COURT: I get it. One of the issues that I have
14 generally with some of these instructions is that they almost
15 purport to be very detailed. But when you get to the bottom of
16 it, the word -- the thing that the jury is trying to determine
17 is sort of indeterminate or vague. Like what is a "legitimate"
18 or what is an "artificial price." And here when does fraud or
19 manipulation coincide with a swap, which can mean different
20 things. And so it would be helpful if there are -- there's
21 something more concrete that I can provide to the jury.
22 Because the way you're addressing it based on the facts that
23 the government expects to prove, that is more concrete. But
24 then the instruction that the government is asking me to
25 provide is fairly vague, which I think poses some difficulties

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1 in this context, especially given the unique factual
2 situation -- not so unique, but more unique than a case that
3 might have been brought decades ago.

4 MR. BURNETT: I think one way to handle it might be,
5 we talked a lot I think at the motion to dismiss stage about
6 the *Chemical Bank* case, whereas the loan is effectively like
7 some sentence that articulates the holding of that, how using
8 something as collateral. Basically, I'm being inarticulate.
9 We could find a way to articulate a legal standard to put in
10 there that would be a legal rule that we think meets the facts
11 or is more a fit with the facts.

12 THE COURT: I agree, and so I may make some proposals
13 to the parties on some specific words to use here.

14 MR. GREENSPAN: Your Honor, if I may.

15 THE COURT: Of course.

16 MR. GREENSPAN: I would just point to, I'm sure the
17 Court has seen our proposals, but I think we tried to do some
18 of that at the bottom of page 30 and top of 31 of our
19 proposals. Like the government cited, the *Chemical Bank* case
20 as requiring in connection with language related to the value
21 of the pledge swap or commodity itself and not other assets.
22 And we also noted that the "coincide" language seems to be
23 qualified by -- that it has to have some meaningful
24 relationship with the swap or the contract of sale. So I note
25 your concern. We had the same concern, and we think that there

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1 is some language in the case law that the "coincide" language
2 is too vague and allows for far too sweeping a definition of
3 "in connection" with and is qualified by those things.

4 THE COURT: Yeah. And I'm not hearing any
5 disagreement really between your position and Mr. Burnett's
6 position. So maybe the parties can talk and come up with a
7 language that both sides can live with. Because I think the
8 example that you gave is pretty much the example the government
9 proffered as well. So it may be that you can just come up with
10 language that puts a little bit more meat on the bones than
11 just coincides.

12 MR. GREENSPAN: We'll discuss that with them, your
13 Honor. Thank you.

14 THE COURT: In the context of what is artificial.
15 Again for the government, it means not legitimate, and so is
16 there another word that we can use other than "not legitimate?"
17 I understand that's been used, but what does that mean?

18 MR. BURNETT: I think what our intent was, was that
19 the rest of the paragraph on the definition of artificial would
20 inform what legitimate -- not what is legitimate, but what is
21 not legitimate. Which in this case not legitimate is prices
22 that are set by the intention of a trader to hit a particular
23 price.

24 THE COURT: Okay.

25 MR. BURNETT: Essentially rigged prices.

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1 THE COURT: This is my second grievance with -- not
2 with either's side position, but because it is perhaps a little
3 bit more difficult to pin down just a specific thing as it
4 might be in some other context, there are more words which can
5 help clarify, but may also serve to confuse the jury in terms
6 of exactly what it is they're trying to find. And that's why I
7 have some issues saying, well, it's false pricing signal. And
8 then saying, it's natural supply and demand. Or as the defense
9 puts it, basic supply and demand. So I like to come up with
10 just one word. Here is what you're trying to find, and have it
11 be something that's more objective and discernible than
12 legitimate or not legitimate.

13 As a general matter, this case is about whether the
14 conduct here was legitimate or not, but we have to put
15 something further behind it. So I raise that -- I need to
16 think about what's the best way to kind of see if we can get
17 some more clarity on this, and I'm going to think about it
18 while we're going through the rest of this. But we have a
19 letter that's coming from the parties, and I may ask the
20 parties to really put their heads together and come up with a
21 single set of instructions noting their disagreements, and
22 maybe that's the best way for me to take it there. Okay.

23 Last issue on the instructions that I have, and then
24 I'll open it up for anything that the parties have. And these
25 are issues that I think I just want to understand now because

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1 they might come up during the course of the openings or
2 examinations.

3 Mr. Greenspan in the request to charge, I think you
4 have three different reasons why you don't think the swaps here
5 are covered by the CEA. Is that right, that there are three
6 different ways?

7 MR. GREENSPAN: That's correct, your Honor.

8 THE COURT: The government identifies the one way to
9 make swaps. Are you planning to provide on all three?

10 MR. GREENSPAN: At this time we are, your Honor. And
11 we noted the mix swap issue in defining the security base swap
12 around that. We are aware that that is an exception to the
13 exception if you will.

14 THE COURT: Understood. I'll turn it over.
15 Government, anything else on the request to charge? And then
16 while you're speaking I'll try to think of logistically how
17 we're going to do this in a way that's going to allow you to
18 prepare for trial and do everything you need to do, but then I
19 need to get down more of these instructions. What I'd like to
20 do is be in a position to send both sides -- here's my proposal
21 on the instructions -- by next week on Thursday or Friday so
22 that you can see them. And that way if there's some glaring
23 issue I was going to argue this to the jury, and now it's
24 inconsistent with what you put in these instructions, you'll
25 have time to do that. But anything substantive on the

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1 instructions based on this discussion that you'd like to raise?

2 MR. BURNETT: Yes. One substantive point what you were
3 just discussing, and then maybe a logistical proposal based on
4 what happened in *Phillips*. On what you were discussing, this
5 is kind of defense's three exception to swab. One of those
6 three exceptions they list is actually just the definition of
7 what a swap is again. It's like not a statutory exception.
8 And the other one, at least on everything I've read in the case
9 law in that statute is actually not an exception, it's an
10 inclusion. It's just they have the statute backwards. So I
11 might ask that we write on that or this is something we resolve
12 beforehand because I think it's just legally deeply confusing
13 and wrong.

14 THE COURT: We're going to include this in our letter
15 that we're putting together a list of items for. If it's
16 something that they're going to argue that it doesn't fit
17 within the definition, then they can make that argument as
18 oppose to presenting it as sort of out from the definition.

19 MR. BURNETT: That was one. On the logistics. The
20 way this works in *Phillips* was I think Judge Liman took
21 basically the two sets of instructions that we proposed. He
22 took a letter that each party submitted on, kind of not here
23 are my general request to charge objections, but here are the
24 objections on sort of the most core things, like artificial
25 price, willfulness, that are likely to come up in an opening;

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1 and did kind of what you're suggesting, gave the parties sort
2 of an indicative, here is what I'm thinking of doing. We had a
3 chance then to have a conference about it so Judge Liman could
4 then adjust if he felt appropriate before trial so we get kind
5 of a crack at the instructions. He wasn't committing that that
6 was going to be the exact wording he used later, but that's how
7 the process went.

8 THE COURT: That seems like a great approach.
9 Mr. Greenspan?

10 MR. GREENSPAN: We second that. We think that's a
11 good approach.

12 THE COURT: Okay. So can the parties meet and confer
13 and get their letters in by say Tuesday at five?

14 MR. BURNETT: Yes, your Honor.

15 MR. GREENSPAN: Yes.

16 MR. BURNETT: Just to make sure I understand. As I
17 was envisioning what would go in those letters is if there's
18 agreement we reach, we'll put that. If there's disagreement
19 we'll say here is our legal position. We won't like submit new
20 jury instruction.

21 THE COURT: No new jury instructions.

22 MR. GREENSPAN: Your Honor, if I may bring up one
23 issue. I don't know if it needs to go into one of the letters
24 or not. One area of disagreement, we sort of touch on this in
25 the beginning is, the defense believes that materiality is an

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1 element that goes to any and all types of deception in Count
2 One. It seems that the government believes that materiality
3 does not apply to manipulation, and so I think that's an area
4 of disagreement.

5 THE COURT: You can put that in the letter. Anything
6 else from the government on the request to charge?

7 MR. DAVIS: Not on the request, your Honor.

8 THE COURT: One issue that was raised, Mr. Greenspan
9 or Mr. Klein, whoever wants to address it in terms of how Count
10 Two is labeled, whether it's commodities manipulation or swap
11 manipulation. Is there still an issue there?

12 MR. GREENSPAN: Your Honor, I think there is. And we
13 feel strongly that the statute is called commodities fraud and
14 commodities manipulation. And if the jury gets a copy of the
15 indictment and sees that and they're given a verdict sheet and
16 an instruction that calls it something else, we think there's
17 confusion there.

18 THE COURT: Is there a reason to deviate from what was
19 in the indictment?

20 MR. BURNETT: Only that I actually think it would be
21 less confusing because only the swap part of Count Two is
22 what's being pursued so it helps focus the jury on I think what
23 is an undisputed aspect of the case, that swap is what is being
24 manipulated or alleged to being manipulated. That's it. that's
25 not a major issue for us.

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1 THE COURT: If it's not, I would say as a technical
2 matter I agree with the government. There's no actual title to
3 this particular provision, right?

4 MR. BURNETT: That's right, no.

5 THE COURT: And you are not actually arguing that a
6 commodity is at issue in Count Two?

7 MR. BURNETT: Correct.

8 THE COURT: So a technical matter, you're just trying
9 to make clear that it's not a commodity that's at issue in
10 Count Two. It's a swap?

11 MR. BURNETT: That's right.

12 THE COURT: But if it's not an issue for the
13 government --

14 MR. BURNETT: If the defense feels strongly.

15 THE COURT: I heard a lot of strong feelings.

16 MR. GREENSPAN: Passion by here, your Honor, passion.

17 THE COURT: So we'll do that. And Mr. Klein or
18 Mr. Greenspan, anything else relating to the instructions?

19 MR. GREENSPAN: No, your Honor. Thank you.

20 THE COURT: Now let's talk about -- well, Mr. Davis.
21 I feel like you have some issues you want to raise.

22 MR. DAVIS: I'm happy to.

23 THE COURT: I'm getting to more of the logistical
24 issues.

25 MR. DAVIS: Okay. In kind of the basket of things

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1 trying to preview issues down the road. We were served with a
2 Touhy request for testimony from a law enforcement officer by
3 the defense. We requested a supplemental notice from the
4 defense. We haven't received one yet. I raised this because
5 as it stands right now, we have both notice and substantive
6 issues with the request, and we would likely want to be in a
7 position to raise those before trial and move to quash that
8 request. So that's one issues that not right for today I don't
9 think, but we just wanted to put that on the Court's radar.

10 The second is in the category of good news I think.
11 We've been working with defense and have been circulating draft
12 stipulations which would have the effect of eliminating a
13 number of small custodial witnesses of this trial. So far we
14 haven't finalized them yet, but our understanding is that we're
15 going to reach agreement on these stipulations that would allow
16 us to cut a number of custodial witnesses from the trial. So
17 we haven't been prepping those witnesses or trying to bring
18 them here for trial in light of that.

19 The third is another issue that we want to raise that
20 might come up during trial for the Court's awareness. We
21 received on Monday, we did an exhibit exchange per the Court's
22 scheduling order. We received approximately maybe less than 10
23 defense exhibits, which of course is totally fair. And at this
24 stage the defense doesn't need to disclose to us what they in
25 their minds have as impeachment that they will use solely for

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1 the purpose of impeaching witnesses. But we worry that what
2 that category is of impeachment is going to be read too
3 broadly. That there might be things that are in that category
4 that should be disclosed to us as either potential exhibits or
5 not impeachment at all. That's one of the issues that we
6 wanted to just flag for the Court. That we have received ten
7 exhibits. That's it. And I don't know if there's anything
8 else to say on that matter, but that's just one issue that
9 might come up down the road.

10 THE COURT: This is like the reverse shot across the
11 bow. It's like when there's a friend that you're fighting with
12 and so you tell your other friend something that you want the
13 other friend to hear, but you don't want to talk to that friend
14 directly.

15 MR. DAVIS: We're all friends here. In the most
16 friendly way possible, the impeachment does not mean everything
17 that exist.

18 THE COURT: I think they heard you.

19 MR. DAVIS: I have logistical things on my list about
20 the first day of trial and the jury selection process.

21 THE COURT: We'll get to that. So on the Touhy
22 request, where are we on that, and when are we in a position to
23 address any objections?

24 MR. KLEIN: Your Honor, my friend there didn't explain
25 that they just sent us their objection yesterday and ask us to

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1 respond immediately. We had other things on our plate. We
2 probably disagree with them, but we are looking at their email
3 and their position and we'll talk to them and see. Our request
4 is for the special agent here to be available to testify. And
5 the reasons are basically people may get on the stand, who the
6 government puts on the stand and may say things differently
7 than what they told the government when they were meeting with
8 them. The special agent is usually the note taker and writer.
9 We'd want him available if we needed to impeach them. Another
10 reason we articulated to them is that we may put him on the
11 stand to -- and this is perfectly appropriate -- to inquire
12 about how they conducted this investigation and the failures in
13 it. And we'll talk to them about this. And if we need to come
14 back to the Court and get you to intercede, we will.

15 THE COURT: Okay. Understood. As soon as you can
16 reach a resolution, bring it to the court. If there are any
17 objections, I will handle it. Anything else from the defense
18 side on kind of the vein of general logistical or here's what's
19 coming next type issues?

20 MR. KLEIN: There is one. Your Honor, we have been
21 going through the exhibit list and we are piecing things
22 together for the rule of completeness. There is one category
23 of exhibits I would just flag that we are likely going to
24 object with and talk to the government about. And those
25 exhibits are press releases and a complaint our client filed.

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1 We think they should not come in. We want to understand the
2 government's theory, we'll talk to them about that. But that's
3 something I want to just put out. That's an example of
4 something we may need a ruling on from you.

5 THE COURT: These are press releases from after --
6 give me the timeframe.

7 MR. KLEIN: I don't have the exhibits in front of me,
8 but they're purported tweets by our client and then attaching
9 press releases to them. Like he would tweet and then say like
10 re-tweet a press release about a case. And the other is a
11 civil complaint he filed in Puerto Rico, so we're going to look
12 at those, and then we'll talk to the government about it.

13 THE COURT: Okay. Sounds good. Anything else on the
14 defense's side? All right. So if there's nothing else in
15 terms of disclosures, 3500 material and exhibits, where are we
16 in terms of making sure those are exchanged?

17 MR. DAVIS: Thank you, your Honor. Quickly as to
18 exhibits. I think we -- both sides exchanged them Monday night
19 at this point. As to 3500. We made our initial disclosure on
20 the deadline by the Court, and I've been making nightly
21 disclosures since then as new things come up and as we get new
22 material. For the 26.2 material, we have received in an
23 initial batch from the defense for -- I think we received a
24 couple of documents on that. I'll let them speak to that. The
25 only thing we -- might I have one second, your Honor.

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1 So, your Honor, we will have a couple of witnesses who
2 we are creating summary charts for, so as those become
3 available we'll be producing those to defense.

4 THE COURT: And Mr. Klein?

5 MR. KLEIN: We produced our Rule 16, 26.2 on the
6 Court's deadline and provided our two exhibits which your Honor
7 might not be surprised are the terms of service later and the
8 lack of terms originally. And we think we've complied with all
9 our obligations with the exhibits at this point we intend to
10 introduce. So I think we're in a good spot.

11 THE COURT: Okay. And the parties should just take a
12 look at my individual practices. And there's some provisions
13 in there in providing those materials to the Court and provided
14 those in electronic form. If you have any questions about how
15 to do that, you can talk with Mr. Hernandez. He will get you
16 the answers. Same thing goes for the exhibit list, which the
17 way we're going to do it, you'll furnish that to the Court with
18 the appropriate columns, and we will keep updating that as we
19 go through trial so everyone is on the same page in terms of
20 what's been offered and admitted.

21 In terms of the list of everybody who's involved in
22 this case who we need to square away with the venire. When are
23 the parties going to be in a position to give us that list?

24 MR. KLEIN: Your Honor, we exchanged witness list, so
25 I think we can come together and put in a group email.

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1 THE COURT: Can I get that by next Thursday?

2 MR. KLEIN: Yes.

3 THE COURT: Let's go to Mr. Davis on jury selection
4 and trial procedure.

5 MR. DAVIS: No, your Honor. We reviewed the Court's
6 individual rules. We understand the Court does the struck
7 panel method. The parties conferred briefly beforehand for the
8 Court's consideration we think three alternates might be
9 appropriate for this case if that works for the Court. I think
10 the way we understand the process will work is that will need
11 us to qualify 32 or so. It's in the rules.

12 THE COURT: What's the reason for having three?

13 MR. DAVIS: I think it's standard practice to have
14 three alternates in a case like this. We anticipate going a
15 week. We might lose a juror, an alternate, a juror for
16 sickness or other reasons, so just to make sure we have enough
17 by the end of trial we think three is appropriate.

18 THE COURT: Let me take a step back. Do we have a
19 better estimate as to the time for trial here. I think
20 initially we scheduled three weeks.

21 MR. DAVIS: Yes, your Honor. I think in light of a
22 number of the stipulations that we hoped to reach, we hope that
23 we can get our case done within a week. So if we open on
24 Tuesday, pick a jury Monday, open Tuesday, and start witnesses
25 on Tuesday, my hope is the government's case is done by Monday,

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1 and then there will be a defense case if any after that.

2 THE COURT: Okay. Mr. Klein, does that seem
3 consistent with your expectations?

4 MR. KLEIN: It does. I mean, we've got a lot of
5 exhibits, but we're taking them as their word that's how fast
6 they'll get through. And our case will be a day or two
7 depending on who testifies.

8 THE COURT: Did you have any question on jury
9 selection, how it will work? It's outlined. If the parties
10 have questions, they should let me know. We do simultaneous
11 peremptories immediately after we get the requisite number of
12 potential jurors and alternates. That's something to be
13 mindful of, and we do that right on the spot.

14 MR. KLEIN: Your Honor, if I can make a suggestion or
15 two comments.

16 THE COURT: Of course.

17 MR. KLEIN: One, we talked to the government before
18 about -- they've given a witness list, but we don't know who
19 they're going to call or what exact exhibits. And we suggested
20 to them that 48 hours in advance of the first day of testimony
21 they tell us the witnesses expected and expected exhibits so
22 that we'll have time and then we can also comply with your rule
23 if something comes up that we're not expecting, a meeting
24 beforehand. And then at the end of each day, trial day, they
25 tell us their next day witnesses and exhibits. So it will be

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1 48 hours before the first day, Monday, sorry Tuesday, and then
2 the evening of or whatever.

3 THE COURT: Mr. Davis, any objection to that?

4 MR. DAVIS: That's fine by us. Obviously with the
5 caveats that things change, witness schedules all that. But
6 that's fine by the government.

7 THE COURT: Do you know at this time who your first
8 couple of witnesses are going to be?

9 MR. DAVIS: I don't think we're in a position to say
10 that right now. I think we're working on that and coming up
11 with finalizing it, but we might be finalizing that up until a
12 few days before trial.

13 THE COURT: But you don't have any objection to the
14 schedule that Mr. Klein outlined?

15 MR. DAVIS: No, your Honor.

16 THE COURT: Disclosure. Let's talk a little bit about
17 the days of -- Mr. Talkin.

18 MR. TALKIN: One jury selection issue, and it doesn't
19 matter to the defense which way you would like to do this, but
20 I just wanted to be consistent. It's always an awkward
21 situation when you introduce the parties and you have a
22 criminal defendant there, whether he's supposed to stand or not
23 stand. I just want to have that in place that he does exactly
24 what the lawyers do, whichever they prefer, the marshals
25 prefer. What I don't like is kind of like a differentiation of

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1 what he's allowed to do as opposed to the attorneys.

2 THE COURT: You have a proposal on that?

3 MR. TALKIN: I think when you introduce everyone,
4 everyone just stands. We'll stand as a group, and obviously
5 the government will stand as a group. And they say, so they
6 can see us and see if they recognize us. That's generally what
7 I've seen done, and generally what I think is okay with the
8 marshals.

9 THE COURT: That's fine with me.

10 MR. TALKIN: Thank you.

11 THE COURT: After the first day -- so the first day
12 we'll start at 9:30. We'll proceed with jury selection. It
13 may take all day, but the parties should be prepared to get to
14 openings and we should have one witness here just in case if we
15 fly jury selection. I don't think that's going to happen, but
16 just be ready to do that.

17 On the second day and until we get to summations,
18 we'll be going from popular request nine to 2:30 with half hour
19 break that will be strictly enforced. Once we get to summation
20 and deliberation, we may go longer. We have the clothing order
21 for Mr. Eisenberg. Has counsel discussed with Mr. Eisenberg
22 whether he wants to be present at any sidebars?

23 MR. TALKIN: No, your Honor. I'll discuss it with
24 him, but my inclination, and I always do it, it creates a
25 circus that is not beneficial to the client when he attends

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1 sidebar, so I'll confirm that with my client just so you know
2 where we're coming from. I don't think that's going to be an
3 issue here. We'll let the lawyers handle it, and I'll confirm
4 that with the Court prior to trial.

5 THE COURT: Mr. Eisenberg, it's your right to be there
6 if you want to be there, but you talk to your counsel about
7 that. Do we know right now whether there's going to be
8 demonstrative in openings? Again, sometimes we have this
9 conference a couple of days in advance so we have a better
10 sense of that.

11 MR. DAVIS: We don't know at this stage, your Honor.

12 THE COURT: Make sure to disclose those consistent
13 with the individual practices. Do it the night before that way
14 you can send an email in and we can come in early. What we're
15 going to do is, so on the first day we're starting at 9:30,
16 second day starting at nine. If I get an email the night
17 before or a letter indicating that there's an issue to be
18 resolved, then we will start 30 minutes in advance of that
19 time. So if there's an issue to be solved, on the first day
20 we'll all come in nine. Starting on the second day, 8:30 so we
21 can resolve everything so it will be crystalized at that point
22 so both sides should know what's happening on that particular
23 day, and that goes with demonstratives.

24 Any demonstratives being used in openings or
25 examination should be disclosed the evening before. If there's

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1 an objection, we can resolve it in the morning. Is the rule
2 going to be invoked by both sides, per rule exclusion, and
3 who's going to be left?

4 MR. KLEIN: Your Honor, I did want to say that we
5 would like to have our experts available to be here and listen
6 to other witnesses, including the opening. We're going to need
7 them potentially to help form cross-examination questions and
8 hear their opening. We don't oppose their experts being here
9 at the same time either or whenever they want them during
10 trial.

11 THE COURT: That's not a problem for me, so unless
12 it's an issue for the government, but the parties should meet
13 and confer on that. If there's an objection, then I'll resolve
14 it.

15 MR. DAVIS: Your Honor, can we discuss that issue and
16 get back to the Court?

17 THE COURT: Absolutely. That's why it's great to do
18 this a week in advance. We can hammer all these issues out.
19 In terms of AV. I think either one side or maybe both sides
20 have scheduled walk-throughs with the courtroom AV, so you
21 should understand how it works. Do a dry run, make sure that
22 you're handy with the technology in the courtroom and let us
23 know if you have any questions.

24 That's it on my end, so I'll open it up for any
25 additional questions or any other issues that the parties want

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1 to raise.

2 MR. DAVIS: Judge, may I have one minute.

3 (Counsel conferred)

4 MR. DAVIS: Your Honor, we're truly in logistics now.
5 For opening, I think we would ask that the podium be moved to
6 the center. I'm not sure if that's okay with the Court or how
7 to logistically do that. I just want to preview that issue, or
8 a shorter podium. I've seen done before.

9 THE COURT: The problem is that we can't move it back
10 and forth. So for present purposes, assume it's going to be
11 there. If there's a way for us to move it back and forth, then
12 we'll look into that. Anything, Mr. Klein?

13 MR. TALKIN: Your Honor, I agree with the government.
14 We'll talk about a way. In the past there's kind of temporary
15 stanchion just for the opening.

16 THE COURT: Where do you want it?

17 MR. TALKIN: In the middle. In other words, you're
18 addressing the jury squarely instead of the one all the way
19 down there. You're kind of looking around.

20 THE COURT: I got you. Basically you're saying that
21 right where all the wires are going in you want it somewhere
22 right there?

23 MR. TALKIN: Yeah.

24 MR. BURNETT: I think the Court has short portable
25 podiums and you can put the screen up on top so the person can

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1 see the screen, but you don't have to actually move the podium.

2 THE COURT: If there's anything that I've figured out
3 in this job, there's nothing that Mr. Hernandez can't do. I
4 think we'll be able to figure out something that will make both
5 sides happy.

6 Anything else? The parties should talk to each other
7 and make sure that transcripts are ordered just as a reminder
8 to the parties. Anything else, Mr. Klein?

9 MR. KLEIN: We're just submitting these letters.
10 Sounds likes you may want to meet with us to talk about all
11 this stuff, the jury instruction letter, as well as other
12 things. We're starting on Monday. Did we want to set aside
13 sometime on Friday? I'm not saying we need a final, final
14 pretrial conference. Sounds like we might need to come back
15 since we have calendars with witnesses and prep. I just wanted
16 to flag that.

17 THE COURT: That's a good point, so let's do it on
18 Friday. Here's the question, can we do it remotely? Because
19 if that makes it easier for both sides now, if Mr. Eisenberg
20 wants to appear, if that's logistically possible, he's okay
21 with it from MDC. MDC can do it. If it's not possible, then
22 we can do it live, but it's a great suggestion.

23 MR. TALKIN: Your Honor, what I'll do is, I'll talk to
24 the government. I think we can arrange him appearing remotely,
25 and I think he'd appreciate not being dragged down an extra

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1 day. It's a tough travel for every defendant, so we will work
2 on that. If that's a fail, we'll get back to you.

3 THE COURT: Mr. Hernandez, is there a slot on Friday
4 that we can use?

5 THE DEPUTY CLERK: One moment, your Honor.

6 THE COURT: Let's do it on the earlier side in case
7 there's are any other issues we're not running into the end of
8 the day. Like 10 a.m. works, Mr. Hernandez. 10 a.m. on
9 Friday, April 5th. We're planning on doing it.

10 MR. GREENSPAN: Your Honor, I think that tech
11 walk-through is Friday at 11. I think that probably gives us
12 enough time. I just wanted to put that on the Court's notice.

13 THE COURT: Let's do it 9:30. Wait. If you're doing
14 the tech walk-through, aren't you going to be here?

15 MR. GREENSPAN: We will.

16 MR. TALKIN: Not all of us, your Honor.

17 THE COURT: I'm doing this remotely to help the
18 parties because I know people are going to be running around,
19 and you don't necessarily want to be here, so I'll do it
20 remotely or I'll do it here. Let's plan on doing it remotely
21 at 9:30 on Friday, April 5th, and we'll put that on the docket.
22 If for whatever reason it's better to just do it in person, we
23 can handle it that way as well. Okay.

24 Anything else from the government?

25 MR. DAVIS: No, your Honor.

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1 THE COURT: Anything else from the defense?

2 MR. KLEIN: No, your Honor.

3 THE COURT: Well, thank you, everyone for coming in.

4 And I understand Mr. Eisenberg is going to utilize the space
5 here. Is that correct?

6 MR. KLEIN: Yes, your Honor.

7 THE COURT: If you need any help or anything else, you
8 can let Mr. Hernandez know. Thank you.

9 (Adjourned)

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